No. 15949

In the United States Court of Appeals For the Ninth Circuit

THE GREYHOUND CORPORATION,
Appellant,

vs.

JUANITA JEAN BLAKLEY, a Minor, by Her Guardian Ad Litem, Sidney W. Blakley,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

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THE REPUBLIC PRESS YAKIMA, WASHINGTON

FILED
JUL 28 1958

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JURISDICTION

This is an action by appellee, plaintiff below, who is a resident of the State of Washington (R. 12) against the appellant, who was defendant below, for injuries received as a result of carbon monoxide poisoning while a passenger on the appellant's bus (R. 12). The appellant is a Delaware corporation (R. 11). Jurisdiction of the trial court was invoked by reason of diversity of citizenship between the parties in accordance with USCA, Title 28, Sec. 1332. Jurisdiction of this court is invoked by reason of USCA, Title 28, Sec. 1291.

Judgment in the court below was entered December 17, 1957 (R. 52). Motion for new trial was served and filed December 20, 1957, (R. 50) and this motion was denied January 17, 1958 (R. 51). Notice of appeal was filed February 14, 1958 (R. 53). Bond on appeal was filed February 14, 1958 (R. 55).

STATEMENT OF THE CASE

The appellant, in its statement of the case, has omitted many material facts which the appellee deems necessary in order that this court view this case in its true perspective. Accordingly, appellee deems it necessary to make her own statement of the case.

Appellee, Juanita Jean Blakley, was born in Prosser, Washington, on January 29, 1937 (R. 395, 495). She moved to Bremerton in 1941, where she resided with her parents until 1945 (R. 396). The family then moved to Coulee Dam, where her father was employed by the Bureau of Reclamation (R. 396, 496). Appellee attended grade school at Coulee Dam (R. 396, 496). As a child the appellee had the usual childhood diseases consisting of measles, mumps, chickenpox (R. 497). She was a very active child (R. 329); she had a good school attendance, and graduated from the eighth grade at the top of her class and on the honor roll (R. 499). Her disposition was good (R. 398). She was a cheer leader, a majorette, and a member of the Rainbow Girls (R. 339, 397).

In July of 1951 the appellee and her parents moved to Kennewick, Washington (R. 399, 498), where she entered and finished her high school education (R. 400). She possessed good health and experienced no physical ailment (R. 255, 285). She was a cheerful and happy person (R. 489). She was vivacious as well as being a good student, and showed great promise (R. 285, 401, 1359). She participated in extracurricular activities by working in the library (R. 500, 1356) and was a high school cheer leader and majorette (R. 251, 256, 400). She belonged to several honorary organizations (R. 499). One of her high school teachers described her high school career. She pointed out that the appellee was a very unusual girl, very active, and took active part in extracurricular work such as dramatics and was a member of the staff of the year book published by the high school (R. 212). She was a good typist (R. 209) and a member of the national dramatic honorary society, to which only top students were admitted (R. 212). She was a member of Quill and Scroll, an international honorary society, and a member of the Pep Club for football and basketball games in addition to her acting as a majorette (R. 212, 213). Apellee was a member of the Girls' Athletic Association, and took an active part in the production of high school plays. She had an I.Q. of 107 and graduated from high school with an average grade of 91.8 (R. 215, 221).

Upon graduating from high school in the spring of 1955 appellee matriculated at the Washington State

College at Pullman, Washington. She was chosen by the Chi Omega Sorority as one of its pledge members in September of 1955 (R. 502). Prior to November 20, 1955, her sorority sisters described her as being in good health (R. 73), energetic (R. 182) and vivacious (R. 116). She was very easy to get along with (R. 149, 168, 182, 255, 304, 347).

On November 19, 1955, appellee, accompanied by her sorority sisters Pattie Murphy, Sandra Whitney and Karen Gilbertson, left Pullman, Washington, on appellant's bus destined for Spokane, Washington, where appellee desired to do some shopping (R. 74, 116). She was taken to the home of friends of her parents (R. 75) where she spent Saturday night (R. 327, 338). On the following day, Sunday, November 20, 1955, appellee went to the home of Karen Gilbertson's parents where she had dinner and was then taken to the bus depot in Spokane to board appellant's bus, which was due to leave at 7:00 o'clock p.m. (R. 75, 117).

Appellant's bus was delayed for approximately one hour in order to make connections with an incoming bus from Seattle which had been delayed (R. 76, 113, 117, 225, 1090). While the bus was in the passenger station at Spokane a Mr. Charles Wheaton, who was a prospective passenger on his way to Moscow, Idaho, which is beyond Pullman, Washington, observed that the bus was an old 1948 model bus (R. 227, 247).

Appellant's superintendent of maintenance for the northern division testified that the bus in question, prior to its departure from Spokane on the night of November 20, 1955, had 883,840 miles logged up (R. 1264). As Passenger Wheaton was standing by the bus he noticed Clare Hamilton, the bus driver, and another person go to the rear of the bus, and open the motor compartment and while there carry on a conversation for about five minutes (R. 227). Eventually they closed the motor gate and allowed the passengers to board the bus (R. 227). (The company's records show the motor gate was in disrepair at that time [Ex. 10], because they had an order to repair it on November 19, 1955, and the repair was not made until November 21, 1955 [R. 1243, 1244, 1245]). Appellee, Karen Gilbertson and Pattie Murphy got on the bus at Spokane and took the only available space which was on the lefthand side of the back seat of the bus (R. 76, 117, 127). In this bus the engine is under the back seat (R. 69). The bus was loaded to capacity with 37 passengers and the driver making 38 (R. 96, 1090). The bus was destined for Lewiston, Idaho, traveling through Spangle, Rosalia, and Colfax, Washington, thence to Pullman, Washington, and into Moscow and Genessee, Idaho (R. 1091). There was an overload of passengers who were put on the following bus which was being operated by appellant's driver, Charles Bailey (R. 1091, 1188).

Near the outskirts or city limits of the City of Spokane, Washington, or shortly thereafter, some of the passengers started to smell fumes in the passenger compartment (R. 77, 117, 118). No one apparently felt any concern about the fumes at that time. There is no testimony in the record from the appellee as to when she began smelling fumes. Because of the nature of her injuries, her memory has been destroyed and she has no recollection of the trip whatsoever (R. 793). This is common in carbon monoxide poisoning cases and is medically known as retrograde amnesia (R. 567). The odor of fumes increased as the bus progressed on its trip in the vicinity of Spangle and Rosalia (R. 77, 85, 97, 98, 99, 117, 1352). Pattie Murphy attempted to open the left rear window but it wouldn't open (R. 118) and also Karen Gilbertson tried to open the window (R. 77) but it would not open. Other passengers noticed the gas fumes in the vicinity of Rosalia (R. 1298, 1339, 1341, 1343, 1344, 1345). Other passengers experienced sickness, nausea and headaches (R. 1140, 1141, 1195, 1206, 1303, 1350). Some of the passengers went so far as to put scarves around their faces to attempt to protect themselves (R. 1167, 1170, 1180, 1195, 1198, 1206, 1298, 1339, 1343, 1345). Both Karen Gilbertson and Pattie Murphy testified positively that they did not know the effect of the fumes (R. 77, 118). There is no testimony in the record that any of the other passengers aboard the bus knew the effects of these fumes. It should be noted at this juncture

that carbon monoxide gas is an odorless, tasteless and colorless gas (R. 446). The fumes that one smells are actually oxides of nitrogen (R. 446).

Shortly before reaching Rosalia Pattie Murphy went forward in the bus and advised the bus driver that she was ill from gas fumes (R. 100, 118, 122, 128, 132). In this she is corroborated by Karen Gilbertson (R. 77, 78). Pattie Murphy sat down in the aisle on a cushion which the bus driver gave her and he opened the window by his side (R. 141, 142, 1110). She also advised the bus driver that the fumes were more prevalent in the back of the bus (R. 119). At Rosalia the bus driver stopped the bus for a regular passenger stop and Miss Gilbertson, Miss Murphy and the appellee, as well as some of the other passengers, emerged from the bus. Miss Gilbertson testified that she believed that the condition of the fumes in the bus was mentioned to the bus driver at that time (R. 79).

After the bus left Rosalia and somewhere in the vicinity of Cashup, Karen Gilbertson and appellee went forward in the bus because they were sick (R. 78, 79, 120, 1093). Appellee and Karen Gilbertson advised the bus driver that they didn't feel well (R. 79, 120). Several minutes later the bus driver pulled the bus off to the side of the highway and the three girls got off the bus to get some fresh air (R. 79, 120, 1093). Appellee passed out (R. 80, 120). At the time of this stop of the bus the driver went to the rear of the bus where he

detected fumes which were particularly prevalent in the last four seats and he proceeded to open all windows that could be opened (R. 1094, 1095, 1119, 1123). Appellee upon getting out of the bus at this time fainted and had convulsions so that it was necessary to help her get back on the bus (R. 80, 113, 120, 1122, 1123). The driver requested two men who were seated in the two front seats to give up their seats to Miss Gilbertson and appellee (R. 80, 121, 229, 1096, 1117). Appellee was gasping for air (R. 121, 1175, 1176, 1123). She was throwing herself about in the seat and became irrational and semi-conscious (R. 121, 230, 1118). Appellee remained in this condition and was in this condition at the time she was removed from the bus at Colfax (R. 81, 230, 358, 365). The bus driver drove immediately to Colfax, Washington, and he stopped at the fire station where he knew he could procure ambulance service (R. 1097). The driver carried appellee out of the bus and put her on the stretcher (R. 1098), which stretcher was in turn put into the ambulance (R. 103, 231, 358). The ambulance attendants administered oxygen to appellee on the way to the hospital and at the hospital (R. 365). Miss Gilbertson and Miss Hays went to the hospital in the ambulance with appellee (R. 82, 121). The bus driver called Dr. Freeman, a general practitioner of medicine at Colfax, Washington (R. 1098) and advised the doctor of the surrounding circumstances (R. 1098). Dr. Freeman stated that he had been called and informed that some-

one had been overcome by fumes on the bus (R. 978). At the hospital the doctor was also informed that the girl had been gassed (R. 367, 83). The doctor took the oxygen mask off plaintiff's face (R. 979) and made a supraorbital examination, which consists of applying pressure above the eye. The appellee was unable to speak so that she could not give the doctor any history, but she was coughing violently and hard to control (R. 968, 969, 989, 83). After this ten or fifteen minute examination made by Dr. Freeman (R. 998) during a period that appellee could not and did not talk but was coughing violently and hard to control and sideboards on her bed were necessary (R. 989), the doctor ruled out carbon monoxide poisoning and diagnosed plaintiff's ailment as hysteria (R. 972, 990). The following morning appellee was dismissed from the hospital (R. 1000).

Karen Gilbertson and Miss Hays returned from the hospital to the bus depot and the trip from Colfax to Pullman, Washington, was resumed (R. 85). The windows of the bus were opened (R. 85); the weather was cold (R. 85), and after leaving Colfax the passengers started moving towards the front of the bus (R. 86). It was after appellee had become ill and had gone outside of the bus when passengers started to move towards the front of the bus (R. 121). Between Colfax, Washington, and Pullman, Washington, the bus finally stalled (R. 86, 122, 233). The engine was running hot

(R. 1191). The engine of the bus was running with a winter front; in other words, the radiator was completely covered, which cut off the air to the motor (R. 1101). The battery would not turn over the starter of the engine (R. 1102, 233). It was necessary for the following bus operated by Mr. Bailey to give a push to the bus in order to start it (R. 1101, 1102, 1137, 1189, 234). At Colfax and again at Pullman Mr. Hamilton stated that he would not take the bus any farther than Pullman (R. 86, 122, 234).

The mechanical condition of the bus involved in this controversy was such that after arriving at Pullman all of the passengers were evacuated and the remaining passengers who were scheduled for Moscow and Lewiston, Idaho, were transferred into the following bus operated by Mr. Bailey (R. 234, 1102, 1126). Mr. Hamilton, the bus driver, stated: "If you have trouble with a bus, if there is any complaint, you don't use it." (R. 1126). He further stated that a defective bus should not be used to haul passengers (R. 1127) and that carbon monoxide fumes are very dangerous when in the passenger compartment (R. 1135). Mr. Bailey, who had been operating the second bus, took over the bus in which the appellee had been riding, at Pullman, Washington, and then deadheaded the same back to Spokane (Ex. 10). Both Mr. Hamilton and Mr. Bailey, bus drivers for the appellant, in Exhibit 10 stated for the benefit of their company records that the diesel

fumes were bad in the seats and that the engine was running hot.

On November 21, 1955, Elizabeth Greenlee, a sorority sister of appellee, noting that she was absent from the sorority house, went to Colfax, Washington, to attempt to find appellee. She found that appellee had left the hospital in the morning (R. 314) so she then went to the bus depot in search of her. She finally found the appellee aimlessly wandering about the street and picked her up and brought her to the sorority house at Pullman (R. 303). Upon returning to Pullman appellee was confined to her bed for about a day and her sorority sisters noticed that she was depressed, slept a lot, was afflicted with headaches (R. 189, 304, 306); she appeared sick and was taking aspirin (R. 87, 183, 184, 187). She did not appear to have any energy, and as time progressed it was noticed that she became worse in that she was getting dizzy spells, lapse of memory, and was required to lie down (R. 88, 89, 107, 125, 150). Appellee began to have difficulty in retaining her studies (R. 124, 151, 169, 202, 307, 348). She lost weight (R. 169), and by April or May she started to have fainting spells (R. 161, 170, 172, 302, 347, 351). On one occasion the house mother of the sorority where appellee lived would not allow one of the sorority sisters to call a doctor for appellee at a time that appellee had apparently fainted (R. 184). This was due to the fact that the house mother was a Christian Sci-

entist and did not believe in a doctor of medicine (R. 185). This was in May, 1956 (R. 184).

On November 21, 1955, after appellee had been returned to Pullman by her sorority sister, Elizabeth Greenlee, the appellee called her family and complained that she had a headache and was not feeling well (R. 509). On the following Thursday appellee went to her home at Kennewick for Thanksgiving vacation. At that time her family noticed that she appeared tired, irritable, complained of headaches and was nauseated (R. 402, 510). When appellee returned for Christmas vacation her family noticed that her condition had become worse and she appeared thin, nervous, upset, and had lost weight and was very irritable (R. 511). They then took her to a general practitioner in Kennewick, Washington (R. 403) who, at that time, did not discover appellee's true condition but advised that a specialist should be consulted if the family was concerned (R. 511, 1134).

As time progressed appellee's family became concerned about her because they noticed that she was emotionally upset, unsteady on her feet (R. 410, 513), and further observed that she was developing a defect in her speech. As a consequence an appointment was made in the early part of May, 1956, with Dr. Robert Southcombe, a specialist in the field of psychiatry and neurology at Spokane, Washington (R. 407, 515, 665).

On May 7, 1956, Dr. Southcombe took a history and performed a psychiatric, neurological and physical examination of appellee (R. 665). At the same time Dr. Millard Jones was called in for consultation as a neurological specialist at Spokane (R. 377). Dr. Jones took an electroencephalogram (R. 677) which is commonly referred to as an EEG for the purpose of discovering whether there was any brain injury (R. 378). Appellee's EEG tracing disclosed that her brain wave was abnormal (R. 380).

Dr. Southcombe, not being satisfied with the results of his first examination, concluded that further investigation was necessary. The result was that on June 13, 1956, the appellee was hospitalized at Spokane, Washington, at which time a spinal puncture was performed upon her and also x-rays were taken of her skull (R. 666). The spinal fluid was determined to be normal (R. 666); this rules out brain tumor (R. 598, 599). Dr. Southcombe diagnosed appellee's ailment as an organic encephalopathy as the result of toxin, specifically carbon monoxide, which was manifesting itself in convulsive phenomena (R. 667). He prescribed anticonvulsive drugs of phenobarbital and mysoline, and as time progressed he increased the dosages and added tridione, also an anticonvulsive drug, useful in the treatment of petit mal type seizures which appellee was experiencing (R. 675). At a subsequent examination in the doctor's office, appellee had fainting spells

or seizures while there (R. 667, 690). Her reflexes progressively became worse (R. 669). Following carbon monoxide poisoning seizures are generally described as epileptic. Appellee will be required to be under a doctor's care the remainder of her life because of the toxic medicines which she is taking at a cost of approximately $25.00 per month (R. 693), and in addition thereto she will be required to take medicines which cost approximately seventy-five cents per day (R. 692, 693).

The diagnosis of Dr. Southcombe was positively confirmed by Dr. Connie I. Hood, who also specializes in the field of psychiatry and neurology, and who hospitalized the appellee on two different occasions as well as having made several office examinations (R. 618, 619, 620). Dr. Hood did an EEG study which proved abnormal and disclosed cerebral dysrythmia (R. 554, 558). Even Dr. Hale Haven, testifying on behalf of the defense, admitted the EEG disclosed dysrythmia (R. 1035). Dr. Hood also did a pneumoencephalogram, which constitutes the injection of air into the spinal cord, to eliminate the possibility of a brain tumor which was definitely ruled out (R. 574, 679, 582, 585, 601, 602, 683). Dr. Hood's unequivocal conclusion was and is that the appellee sustained carbon monoxide poisoning with neurological sequelae resulting in damage to the brain and central nervous system (R. 548, 586).

The appellee's father did not tell her the diagnosis which Dr. Southcombe had made in June of 1956 at that time because he didn't want to make it any harder on his family than he had to (R. 408). Notwithstanding the fact that appellee had been put on anticonvulsive drugs in the summer of 1956, she nevertheless sought and obtained employment with the General Electric Company (R. 408, 519). After appellee started working for General Electric Company she sought to have a renewal of her driver's license. The Washington State Patrol refused to issue her a driver's license after 1956 (R. 409, 798). She was no longer competent and capable of driving a motor vehicle on the public highway (R. 409, 291).

During the course of the trial appellee's testimony revealed her loss of memory and retrograde amnesia (R. 793, 794) and she also testified concerning her defect in talking, memory and concentration, and also as to her feeling of dizziness and headaches (R. 803, 804).

While appellee was employed at General Electric Company at Richland, Washington, Gayle Ryals noticed that she was unable to drink a coke or coffee without spilling it over her dress because she was missing her mouth (R. 269). Both Gayle Ryals and also another employee by the name of David Buel observed appellee fainting while at work which necessitated her having to be taken to the ladies' restroom (R. 263, 270, 272). This on occasions required appellee to be taken home

(R. 262, 263). Mr. Buel also observed her fainting or going into a seizure at the parking lot where he had his car parked (R. 262). They covered up for appellee at work (R. 801). She would run into such things as doors and also trip over things (R. 800). She also had fainting spells while at work (R. 800). She doesn't know when these spells are going to happen (R. 801). She was put on work restrictions; in other words, she couldn't be left alone over a half hour, she couldn't go up any stairs, and could not leave the building (R. 802). After she had a real bad spell at work they asked her for her resignation (R. 801). She didn't want to resign (R. 801). Finally she took a vacation and while she was gone on vacation her termination papers were made out by another person without her consent (R. 802, 274). Appellee was earning $73.30 during her employment with General Electric Company (R. 868).

Carbon monoxide gas is colorless, odorless and tasteless (R. 446). An inhalation of this gas by human beings will, among other things, frequently produce a sense of well-being (R. 739). It is agreed by all of the experts that the hemoglobin of the blood of human beings has an affinity for carbon monoxide at a ratio of 300 to 1 as compared to oxygen (R. 549, 670, 747, 923). A person who comes out of a room contaminated with carbon monoxide gas into the fresh air will suddenly collapse (R. 570, 755). This is due to the fact that the exertion of the individual requires more oxy-

gen to be furnished to the brain. The oxygen to the brain has been decreased and carbon monoxide has been substituted with the result that the brain does not receive an adequate amount of oxygen. Oxygen should be administered as quickly as possible (R. 570), and as a general rule, for every half hour exposure to carbon monoxide, two hours of administration of oxygen should be given (R. 571). It is also agreed among the experts that carbon monoxide contaminated air in the proportion of 2000 parts to one million, or one-fifth of 1%, would result in a blood saturation of 60 to 70% in one-half to three-quarters of an hour (R. 554, 555, 755, 766) ; that all persons are not affected in the same manner and to the same extent by carbon monoxide poisoning (R. 763). Younger people appear to be more susceptible to carbon monoxide poisoning (R. 771). Dr. Warner gave an example of this proposition by relating that in November of 1957 he had occasion to attend two young patients exposed to carbon monoxide gas while sitting in the back seat of an automobile for approximately two hours. One patient was unconscious when she arrived at the hospital and was resuscitated and revived, but the other one was dead upon arrival at the hospital (R. 738).

Carbon monoxide combines with the hemoglobin to the exclusion of oxygen (R. 549, 995) which results in anoxia or a deprivation of oxygen to the brain (R. 550, 996). Under such conditions, in a fleeting period of

time the brain sustains irreparable damage, because the brain cells and the spinal cord die due to the lack of oxygen and will not regenerate themselves, with the result that the injury sustained is permanent (R. 670, 671).

Carbon monoxide poisoning, as distinguished from the gas itself, is fairly easily determined by a medical man. It brings about headaches, pressure in the temporal area, the face is flushed; sometimes a sudden insult of carbon monoxide poisoning will bring about a pallid or waxy appearance in the skin (R. 742, 743); judgment is impaired giving one a sense of well-being, and in addition headaches and nausea will appear (R. 567, 687, 739). Continued exposure results in affected vision to blinding, difficulty in hearing, deafness, dizziness, and the muscles will become weak and collapse; nausea is evidence, and the respiration increases and becomes labored, rapid and deep, and will stop for a second or two (R. 740); the blood pressure will rise and the pulse accelerate; in severe cases the body temperature will rise and then drop (R. 746), as demonstrated in this case by Exhibit 64 (R. 970, 971) which is the hospital record at the Colfax Hospital.

Appellee's prognosis, according to the medical experts, will eventually result in Parkinsonism, which manifests itself in tremors, palsy and stumbling (R. 592, 690), and her present disability is from 75 to 90% (R. 593). She will be unable to do ordinary things

and to participate in ordinary activities and will have a poor memory (R. 577, 580, 583, 594, 716). There is no known medical cure for this condition and her disability will increase.

During the course of this trial appellee was noticed to be unsteady on her feet (R. 154, 178) and was unable to walk without holding onto someone. She went into a seizure and lost consciousness while walking on the street (R. 154, 191, 412). After she regained consciousness she was unable to remember events taking place immediately prior to her seizure (R. 155, 192, 534).

The bus involved in this litigation was propelled by a two-cycle engine which fires at every stroke of the piston (R. 1161). The back seat is so constructed so that there is a space between it and the rear of the bus, which space is covered by a plastic cover running crosswise (R. 1231, Ex. 68). The plastic covering in the bus involved in this litigation had a 16-inch tear on the rear lefthand side behind where appellee was seated on the 20th day of November, 1955 (R. 1232, 1258, 1259, 1276). The exhaust ports which contained the exhaust gaskets are situated immediately under the back seat (R. 1249), so that the exhaust escaping through the gaskets would rise upward into the space between the back seat and the back of the bus, in sort of a jet action, as described by the defense experts,

coming out into the passenger compartment through the torn plastic covering (R. 1155, 1250, 1254, 1255, 1256) at appellee's nose level (R. 1259, 1260). At this point reference is made to Exhibit 10, which shows that the appellant replaced the gaskets in the engine and also repaired the tail pipe of this bus the day after the accident here involved. Thus the appellee unknowingly was directly exposed to the exhaust fumes containing carbon monoxide before they had an opportunity to be diluted in the air in the atmosphere of the passenger compartment (R. 1260).

During the course of the trial when the bus was examined, a flashlight placed at the exhaust ports where the exhaust gaskets are located could be seen by looking down through the tear behind the back seat (R. 1264). The evidence further disclosed that improper combustion would result in more than the usual amount of carbon monoxide in the exhaust. As shown further by the evidence in this case, the engine on this bus was running hot.

The jury, after having heard the evidence which we have heretofore referred to, and also additional evidence which we will discuss more in detail in our argument, returned a verdict for the appellee. Appellant filed a motion for new trial which was argued and denied. This appeal then followed.

INSUFFICIENCY OF APPELLANT'S SPECIFICATIONS OF ERRORS

Appellee calls the court's attention to appellant's specifications of errors (App. Br. 10) and challenges the propriety and adequacy of the same.

Appellant's first specification of error is based upon the trial court's failure to grant the defendant's motion at close of plaintiff's case. Appellant did not rest upon its motion but introduced evidence (R. 825). Accordingly, this alleged error has been waived. *Mutual Life Insurance Co. of New York v. Wells Fargo Bank and Union Trust Co.*, 86 Fed. 2d 585 (C.C.A. 9).

Appellant's second specification of error claims the trial court erred in denying appellant's motion at the close of all the evidence. This specification of error does not particularize wherein the trial court erred. The reference in the second specification of error to the first specification of error for a basis of the specification of error does not comply with Rule 18 (2) (d) of this court.

Appellant's third specification of error does not particularize the error and improperly incorporates the reasons set forth in appellant's first specification of error. Rule 18 (2) (d).

Appellant's fourth specification of error fails to set forth the instruction which the trial court actually gave on res ipsa loquitur, which is required by Rule

18 (2) (d) of this court. Also, the exception taken (R. 1456) is too general. See *Woodworkers Tool Works v. Byrne*, 191 Fed. 2d 667 (C.C.A. 9).

The appellant's fifth specification of error violates Rule 18 (2) (d) of this court in several respects. First, it "packages" together three separate and distinct claims of error in one specification of error. This is contrary to the rule of this court, as well as its decisions. *Mutual Life Insurance Co. of New York v. Wells Fargo Bank and Union Trust Co.*, 86 Fed. 2d 585 (C. C. A. 9); *Kobey v. United States*, 208 Fed. 2d 583 (C. C. A. 9); *Thys Co. v. Anglo-California National Bank*, 219 Fed. 2d 131 (C.C.A. 9). It is to be borne in mind that contributory negligence and assumption of the risk are entirely separate legal doctrines and theories. *Walsh v. West Coast Coal Mines*, 31 Wash. 2d 396; 197 P. 2d 233. The question of mitigation of damages, which is sometimes raised, does not defeat recovery but only goes to the amount. This is referred to as avoidable consequences by the legal scholars and is a separate and distinct doctrine. See *Prosser on Torts*, 287 (1955 Ed.).

Furthermore, the appellant's exceptions at the time of trial to the court's refusal to give the instructions (15, 16 and 17) are only general exceptions (R. 1456) which is insufficient under Rule 51 of the Federal Rules of Civil Procedure. Furthermore, appellant did not except to the court's failure to give its instruction No. 14

(R. 1456) although the instruction is set forth in its fifth specification of error in its brief. Additionally, it should be noted that the appellant submitted an instruction on the issue of mitigation of damages (R. 41), which, of course, was refused but the appellant has failed to include this instruction in its brief in accordance with Rule 18 (2) (d) of this court. Under such circumstances, this court has held such alleged error would not be considered. *Shevlin-Hixon Co. v. Smith*, 165 Fed. 2d 170 (C.C.A. 9).

Appellant's sixth specification of error, which asserts the court erred in submitting to the jury the question of the bus driver's negligence is not properly before this court because this alleged specification of error is not contained in the statement of points on which appellant relies (R. 1465), which is required by the rules of this court, Rule 17 (6). Furthermore, the instruction which the court actually gave (R. 1442) is not set forth totidem verbis as required by Rule 18 (2) (d) of this court, and, further, the exception taken (R. 1457) is only in effect a general exception which does not comply with Rule 51 of the Federal Rules of Civil Procedure. *Shevlin-Hixon Co. v. Smith*, 165 Fed. 2d 170 (C.C.A. 9); *Woodworkers Tool Works v. Byrne*, 191 Fed. 2d 667 (C.C.A. 9). The exception actually taken by appellant (R. 1457) furthermore is ambiguous in that it does not state whether the instruction fails to set forth a standard of care or whether it is the

evidence which fails to establish a standard of care. Insofar as appellant complains that the bus driver's negligence was not covered in the pretrial order, it is to be pointed out that appellant in its exception (R. 1457) does not make any complaint of the bus driver's negligence not having been covered in the court's pretrial order. Accordingly, this alleged error has been waived. *Pennsylvania Greyhound Lines v. McKenzie*, 237 Fed. 2d 204.

The insufficiency and the inadequacy of appellant's specification of errors in the particulars heretofore pointed out and its failure to comply with the rules and decisions of this court will not again be reasserted in this brief. The appellee, without waiving the points made herein, will now answer the appellant's brief in the same order that appellant has argued its alleged errors.

ARGUMENT

I

THERE WAS NO FAILURE OF PROOF

Appellant contends the evidence failed to establish proof of negligence on its part (App. Br. 17).

Appellant (App. Br. 18) states that the driver was not notified of fumes until approaching Cashup, a short distance from Colfax. Testimony in the record refutes this and shows notice to the driver before reaching Rosalia (R. 118, 119, 131, 141). Contrary to the statement of appellant (App. Br. 18, 19) the bus stopped only twice. One stop was at Rosalia, which was a normal bus stop where he was waiting for Mr. Bailey, the following bus driver (R. 1119). Appellee and Karen Gilbertson got off the bus at Rosalia with other passengers (R. 119, 120, 228). The next and only other stop was in the vicinity of Cashup when appellee and Karen Gilbertson came forward because they were sick and the bus driver brought the bus to a stop, at which time appellee, upon going outside of the bus, fainted. (R. 1122, 1123, 78, 79, 120, 1093). The bus driver opened the windows in the bus after the appellee had been taken off the bus and fainted (R. 1122, 1123). He then opened every window in the coach that could be opened (R. 1120). Some windows could not be opened (R. 1123). Prior to this time the bus driver had opened the *one window beside him* and to his left when Pattie Murphy had come forward complaining of fumes and

sickness (R. 119). After appellee had fainted and began having convulsions, rapid breathing and appearing semi-conscious she never returned to the back of the bus (R. 1123).

Mr. Whitman, whom the appellant quotes (App. Br. 19) is quoted out of context. He testified that most of the people around him were complaining about the fumes (R. 1172). In appellee's statement of the case we have referred to the record which establishes beyond doubt that on the night in question this bus contained an excessive amount of fumes coming from the bus engine. We have established that other passengers noticed the fumes; some became sick, nauseated and had headaches. We have shown that appellee was unwittingly sitting on the back seat and in a precarious position, unkown to her, where the fumes were entering the coach (R. 1250, 1260).

Appellant's Own Records Establish The Bus Was Defective

It seems strange that appellant, nowhere in its brief has told this court that this bus on the night in controversy stalled on the highway between Colfax and Pullman, Washington, and had to be pushed (R. 86, 122, 233, 1101, 1102, 1137, 1189, 234). It was taken out of service and deadheaded back to Spokane. Appellant has not told this court that its own drivers reported the engine running hot and the fumes very bad and strong in the passenger compartment. (See Ex. 10.)

Appellant has not told this court that its own records show that immediately after this incident a new set of exhaust gaskets were installed and work was done on the tail pipe (Ex. 10). Appellee showed that if the tail pipe was restricted this could in turn cause a back force or pressure on the engine, causing the gaskets to blow and the engine run hot (R. 448, 1246, 1247). The motor gate on this bus was defective. (R. 1244). The bus had on a winter front which covered the radiator and thus cut off air to the motor (R. 1101). This would not allow fumes leaking from the engine to escape out through the defective motor gate. The fumes had to go somewhere; they did, into the passenger compartment.

Appellant's Subsequent Tests

Appellant argues tests made on the bus in question shortly before and at time of trial demonstrate carbon monoxide poisoning was impossible (App. Br. 30). The jury had a right to disregard them because they were not made under similar conditions:

1. When made the engine was not running hot (R. 1276).

2. The bus had only 8 passengers (R. 947) as contrasted to 37 plus one driver when appellee was injured. Obviously the amount of cubic air displaced by the additional passengers would cause a greater concentration of air in the bus compartment.

3. When the tests were made no one experienced nausea or headaches (R. 1162, 1163). On the night appellee was injured passengers were sick, nauseated, had headaches, et cetera.

4. At the time of the tests the exhaust pipe had been repaired.

5. The tests were not conducted in the exact spot and location where appellee was seated.

6. Tests were conducted at a different elevation (R. 945) and there was no showing the atmospheric pressure was the same.

7. There was no winter cover over the radiator of the engine at the time of the tests (R. 1276).

8. At the time of the tests the engine of the bus had just been overhauled in November, 1957 (R. 1263).

The foregoing demonstrates, we believe, that the jury was entitled to disregard the evidence of tests submitted by the appellant.

Nature of Carbon Monoxide Gas

Carbon monoxide gas is odorless, tasteless and colorless (R. 446). Exhaust from a diesel engine contains carbon monoxide gas in addition to the other gasses that do have a smell (R. 471). Dr. Freeman, called by appellant, testified that his experience showed that people received carbon monoxide poisoning from diesel engines (R. 976, 977). This gas affects people different-

ly (R. 763). Young people who are small and active are more susceptible to this poisoning (R. 771, 688). Appellee is young, small, and was active prior to her injury.

Medical Testimony

Carbon monoxide poisoning immediately affects judgment and gives one a sense of well-being (R. 569, 739). It causes dizziness, headaches and nausea and impairs memory (R. 739, 740, 567, 674). The damage as the result of carbon monoxide poisoning is immediate; however, it takes time for the residuals to appear (R. 587, 739) with the result that people exposed must be watched for a minimum of one year (R. 739) and it is even possible for residuals to appear ten to fifteen years afterwards (R. 998).

The Cheynes-Stokes respiration is one where the person has an irregular respiration where they breathe three or four times or so and then stop breathing, and then breathe again; in other words, the respiration is very irregular with pauses between it (R. 614, 615). This is apparent in the early stages of carbon monoxide respiration (R. 615). Compare the testimony of Mr. Wheaton, who observed appellee on the bus after she had been placed in the front, where he said, "She got consistently worse. Then as she got worse, she then began gasping for air. There would be periods when she would hold her breath" (R. 230). To the same ef-

fect, see testimony of appellant's witnesses, Janet McBride (R. 1342) and Judy Evans (R. 1346). The reason for this type of breathing is because the brain does not get sufficient oxygen (R. 615). Dr. Warner also described the Cheynes-Stokes respiration as a definite sign of carbon monoxide poisoning (R. 740).

Both Dr. Southcombe and Dr. Hood, who have attended appellee, diagnosed her condition as a direct result of carbon monoxide poisoning with resulting sequelae (R. 667, 548, 586). Appellee's damage is permanent (R. 592, 690, 593, 577, 580, 583, 594, 716). Drs. Harris, Warner, Southcombe and Hood all testified that the x-rays which have been introduced in evidence disclosed that appellee now has atrophy of the brain (R. 681, 599, 750, 719).

The negligence of the appellant need not be established by direct evidence, but like any other fact may be proven by circumstantial evidence. *Johnson vs. Griffith's S. S. Co.*, 150 F. 2d 224, (C.C.A. 9), *Myers vs. Little Church by the Side of the Road*, 37 Wn. 2d 897, 227 P. 2d 165, *Nelson vs. West Coast Dairy Co.*, 5 Wn. 2d 284, 105 P. 2d 76. It is not incumbent upon the appellee to establish its case against the appellant beyond a reasonable doubt. In *St. Germain vs. Potlatch Lumber Co.*, 76 Wash. 102, 135 Pac. 804, the Supreme Court of the State of Washington said:

> "A plaintiff in this character of case is not obligated to establish the material facts essential to a

recovery beyond a reasonable doubt. Such a rule would amount to a denial of justice."

An examination of the cases cited by appellant in its argument will disclose that factually they do not have the foundation such as has been established by the facts developed in the case at bar. Accordingly we deem it unnecessary to discuss them further.

Appellee desires the court in considering this matter to also consider the next section of appellee's brief dealing with the doctrine of res ipsa loquitur which appellee contends, and the trial court so held, is applicable to the facts in the case at bar. Also, we desire to have the court consider the question of the negligence of the bus driver, which is treated separately in this brief as well as in appellant's brief.

It is submitted that the trial court properly denied appellant's motions and submitted the question of the appellant's negligence to the jury.

II

THE DOCTRINE OF RES IPSA LOQUITUR IS APPLICABLE TO THE FACTS

The appellant argues (App. Br. 33) that the court erred in submitting this case to the jury on the theory of res ipsa loquitur. With this contention appellee obviously disagrees.

The doctrine has recently been stated in *Kind vs. Seattle*, 50 Wn. (2d) 485, 312 P. (2d) 811, as follows:

> "Where a plaintiff's evidence establishes that an instrumentality under the exclusive control of the defendant caused an injurious occurrence, which ordinarily does not happen if those in control of the instrumentality use ordinary care, there is an inference, permissible from the occurrence itself, that it was caused by the defendant's want of care. *Nopson v. Wockner*, 40 Wn. (2d) 645, 245 P. (2d) 1022. Legal control or responsibility for the proper and efficient functioning of the instrumentality which caused the injury and a superior, if not exclusive, position for knowing or obtaining knowledge of the facts which caused the injury, provide a sufficient basis for application of the doctrine. *Hogland v. Klein*, 49 Wn. (2d) 216, 298 P. (2) 1099. When these circumstances are shown, the plaintiff has made a *prima facie case*, and it devolves upon the defendant to produce evidence to meet and offset the effect of the presumption. *Hogland v. Klein, supra.*"

The Doctrine of Res Ipsa Loquitur has been applied in the case of a passenger who jumped from defendant's streetcar when an explosion on the streetcar took place. The court held that the doctrine was partic-

ularly applicable in common carrier cases. *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 82 Pac. 995.

The case was approved with many additional citations in the case of *Hayes vs. Staples*, 129 Wash. 436, 225 Pac. 417.

The Doctrine of Res Ipsa Loquitur has been held applicable in cases against common carriers by reason of injuries due to carbon monoxide poisoning. *Thomas v. Kansas City Public Service Co.* (Mo.) 289 SW (2d) 141, wherein the court stated:

> "This is a res ipsa loquitur case. The court will judicially notice the fact that the presence, in injurious quantities of carbon monoxide gas within defendant's bus bespeaks negligence."

See also *McLean vs. Missouri Pacific Transportation Company*, (Ark.), 187 SW (2d) 727, and also *Coastal Coaches vs. Ball*, (Texas), 234 SW (2d) 474, 22 A. L. R. (2d) 955. In the latter case the appellant argued much as the appellant in the case at bar argues. The court in that case stated:

> "The appellant argues that there is no competent testimony that the appellee suffered from any carbon monoxide fumes and says that the appellee's 'whole case as to being gassed is founded purely on hearsay testimony, that is to say, what other persons told him had happened to him'. While, of course, the appellee did not know the name of the chemical compound of a gaseous nature which affected him while riding on the bus, there is no question that he did suffer from exhaust fumes in the bus. The appellee established by the testimony of a chemist that carbon monoxide is contained in

> the exhaust fumes of motor vehicles and both physicians who testified established that the appellee had suffered physical injury as the result of carbon monoxide poisoning. While it is true that there were some statements made to appellee to the effect that he had been gassed, this fact does not detract from but rather adds to the other evidence in the record tending to prove that Ball in fact was injured by the inhalation of carbon monoxide gases. We think it of some significance that the bus driver himself, after the trip was resumed from High Island to Galveston, in a substituted bus, told Ball that he had been gassed and that he should get as much fresh air as possible. It is also of some significance that the bus driver did not proceed on the remainder of his journey from High Island to Galveston in the bus in which Ball had been riding to High Island but secured another bus from his company, because, as he testified, 'he was afraid someone else might get gassed'."

Although appellee in the case at bar submits that her case is stronger, yet it is obvious from the above quotation that there are a number of similarities.

Without restating the record, but referring to appellee's statement of the case and also appellee's argument that there was no failure of proof, it is submitted that this is a typical res ipsa loquitur case and that appellant did not overcome the prima facie case made against it. Appellant's own evidence, Exhibit 10, shows there were fumes in the bus in addition to the testimony of numerous passengers. The appellant's experiments even disclosed that there was carbon monoxide in the bus. We believe that these experiments were not conclusive because they were not conducted under the

same circumstances as we have heretofore pointed out. The jury by its verdict necessarily so concluded.

The trial court in ruling upon the applicability of the Doctrine of Res Ipsa Loquitur, properly observed that passengers boarding a common carrier bus do not carry along testing machinery to test the content of the air (R. 817). And there was sufficient testimony in this record to submit the same to the jury for its ultimate decision as to the facts and render a verdict thereon (R. 816). We submit that the Doctrine of Res Ipsa Loquitur applies and that appellee has a much stronger case than many of the ordinary cases where the Doctrine of Res Ipsa Loquitur is held applicable.

III

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT ON CONTRIBUTORY NEGLIGENCE, ASSUMPTION OF RISK AND MITIGATION OF DAMAGES

Appellant's fifth specification of error (App. Br. 11) asserts the trial court erred in refusing to instruct on contributory negligence, assumption of risk and mitigation of damages. The first paragraph (App. Br. 37) contains statements contrary to the record. Appellee did not move to withdraw the alleged issue of mitigation of damages from the jury. It was appellant who raised this point, (R. 1420) and the court stated (R. 1421):

> "But if, as is shown by the undisputed evidence here, the doctor tells a patient, 'you have got hysteria, you haven't got carbon monoxide; if you have any further trouble let me know', wouldn't she have a right to believe that any further symptoms she had was the hysteria rather than the carbon monoxide?"

At that time counsel for appellant said:

> "I think so. Well, those are the points."

(R. 1421) Also contrary to the statement of appellant, (App. Br. 37) the court did not instruct the jury specifically withdrawing the issue of mitigation of damages from its consideration (R. 1456).

The Question of Mitigation of Damages

Appellant's argument (App. Br. 37-40) omits much of the actual record of this trial. Dr. Freeman, (whose diagnosis the jury obviously did not believe in view of the other medical testimony), diagnosed appellee's condition as hysteria (R. 983). The doctor simply made a mistake in his diagnosis. It is not unusual to find a reputable doctor making a mistake in his diagnosis of a case. The appellant in its brief does not claim that Dr. Freeman was a quack or charlatan and neither does appellee. Certainly appellee had a right to believe the diagnosis of Dr. Freeman even though it was wrong. The appellant even admits that the appellee had a right to rely upon Dr. Freeman's diagnosis. We must bear in mind that the appellee is a young girl, not a doctor. In approximately thirty days from the time appellee was seen by Dr. Freeman, she then went to Dr. Freund in Pasco, Washington, for an examination (R. 1131). Dr. Freund is a general practitioner and a reputable doctor. Even appellant admits this in its brief. There is no claim that the appellee had no right to rely upon his medical conclusion. It should be pointed out that Dr. Freund was frank enough to admit that he did not have an electroencephalogram and that he was a general practitioner and not an expert, but recommended seeing a specialist if the trouble persisted (R. 1134). As appellee's condition continued to worsen, she ultimately went to a specialist in Spokane, Wash-

ington, approximately eighty miles from school. This was Dr. Southcombe, a neurologist and psychiatrist, a man eminently qualified in his field and former superintendent of the Washington State Hospital. Dr. Southcombe examined appellee on May 7, 1956 and took a history (R. 665), and also had an electroencephalogram taken (R. 697). Dr. Southcombe at that time could not come to any definite conclusion, but decided that more investigations were necessary. Again on June 13, 1956, at the request of Dr. Southcombe, the appellee was hospitalized, a spinal puncture was done, as well as x-rays of her skull (R. 666). It was not until after all of this examination that Dr. Southcombe finally came to the medical conclusion that the appellee was suffering from an organic encephalopathy as a result of a toxin, specifically, carbon monoxide, which was manifesting itself in convulsive phenomena (R. 667). Appellant has offered no evidence that Dr. Southcombe was incompetent or not a qualified man in his specialty. Certainly appellee had the right to rely upon Dr. Southcombe.

The evidence in this record stands uncontradicted, that once a person has been subjected to carbon monoxide poisoning an injury has occurred. The result is permanent and there is no medicine in the world that can undo the damage and injury caused (R. 671, 741). The anticonvulsant drugs that were prescribed for appellee (R. 675) do not repair any brain damage or damage

that has been done to the nervous system. They are simply given to reduce the irritability of the cerebral cortex (R. 695) and at first they didn't even do that (R. 695). These drugs have to be increased (R. 697). Even after Dr. Southcombe had arrived at his diagnosis of the appellee, nevertheless appellee went on and obtained employment at the General Electric Company at a time when she was under the doctor's care and taking the drugs prescribed. As shown by this record the drugs did not prevent the seizures or fainting spells. They did not restore her memory, nor did they restore her balance or coordination.

It is submitted that the appellant has utterly failed to point out in any respect whatsoever what the appellee could do or should do in order to mitigate damages. Her condition will become progressively worse even though she continues to take the medicines, because by the very nature of the injury that she sustained medicines will not regenerate brain cells or that part of the nervous system that has been destroyed. We submit that the appellee has, in every respect, acted as a reasonable and prudent person under the circumstances and that the trial court was proper in refusing to give the appellant's requested instruction on mitigation of damages. It would have been prejudicial error for the trial court to instruct the jury on this issue, because there was no substantial evidence that appellee did or failed to do anything that would have

mitigated the damages she sustained. *Leavitt v. DeYoung*, 43 Wn. (2d) 701, 263 P. (2d) 592 and cases cited therein.

Trial Court Properly Withdrew Alleged Contributory Negligence From Jury

Appellant in its fifth specification of error also asserts the court erred in withdrawing the issue of contributory negligence from the jury. Contributory negligence and assumption of risk are considered distinct legal doctrines in the State of Washington. *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P. 2d 233. The burden is upon the defendant (appellant) to plead and prove by substantial evidence that the plaintiff was guilty of contributory negligence. *Kingwell v. Hart*, 45 Wn. 2d 401, 275 P. 2d 431. The scintilla of evidence rule is not recognized and unless a party adduces substantial evidence in support of the contention, there is no issue for the jury. *Evans v. Yakima Valley Transportation Co.*, 39 Wn. 2d 841, 239 P. 2d 336. *Neel v. Henne*, 30 Wn. 2d 24, 190 P. 2d 775. It is reversible error to instruct the jury upon an issue which is not supported by substantial evidence. *Leavitt v. DeYoung*, 43 Wn. 2d 701, 263 P. 2d 592. *Rathke v. Roberts*, 33 Wn. 2d 858, 207 P. 2d 716. *Hanford v. Goehry*, 24 Wn. 2d 859, 167 P. 2d 678. In accordance with the foregoing principles it has been held reversible error to submit the issue of plaintiff's contributory negligence to the jury without substantial evidence to

support the same. *Schneider v. Midwest Coast Transport Inc.*, 151 Wash. Dec. 634, 321 P. 2d 260. See also *Jackson v. Seattle*, 15 Wn. 2d 505, 131 P. 2d 172, where Judge Driver (who was the Federal trial judge in this case), speaking for the Supreme Court of the State of Washington, sets forth the duties of a common carrier and held that the trial court erred in submitting the issue of plaintiff's contributory negligence to the jury because there was no substantial evidence to sustain the same.

Appellant says, "Nevertheless neither she (referring to appellee) nor any of the girls complained to the driver until three-quarters of the way to Pullman just shortly before they got to Colfax." (App. Br. 40) This statement utterly disregards the testimony of Pattie Murphy who stated positively she advised the bus driver of the fumes before they reached Rosalia (R. 118, 119, 131, 141), which was corroborated by Karen Gilbertson (R. 77, 78).

Appellant says, "Since some of the people moved forward or opened the windows before Miss Blakley did, there obviously was room for reasonable minds to differ * * *." (App. Br. 43) This statement is not supported by the record, which is directly to the contrary. The first window opened was by the bus driver (R. 119) when Pattie Murphy came forward in the bus and complained (R. 119, 120). The windows in the back of the bus where the girls were seated would

not open (R. 77, 81, 118). When the bus stopped in the vicinity of Cashup and appellee was removed therefrom and fainted, the driver then opened all the windows that could be opened (R. 1120, 1122, 1123). The passengers in the bus did not move forward until appellee had been taken off the bus and sent to the hospital and the bus was traveling from Colfax to Pullman (R. 86, 121).

The trial court in determining whether the issue of appellee's alleged contributory negligence should be submitted to the jury had the right to consider the fact that appellant was a common carrier and owed to its passengers a very high degree of care. *Jackson v. Seattle*, 15 Wn. 2d 505, 131 P. 2d 172. The court further had the right to consider that appellee as well as the other passengers on the bus were entitled to assume that the bus and all of its equipment were reasonably safe and that the appellant had taken all necessary precautions for the safety of its passengers. *Jenkins v. Kansas City Public Service Co.*, 127 Kan. 821, 275 Pac. 136, and that there was no duty on the part of the passengers to make an inspection of the common carrier equipment. *Chicago R. I. & P. Railroad Co. v. McCrary*, 179 Ark. 444, 16 SW 2d 466. The court further had the right to take into consideration the presumption in favor of appellee that she was in the exercise of due care and would take reasonable and necessary steps to protect herself, and this is espe-

cially so because the injuries she suffered destroyed her memory of all things that transpired on the bus trip (R. 793, 414, 289, 567). Cf. *Geer v. Gellerman*, 165 Wash. 10, 4 P. 2d 641. The court had the right to consider that both Pattie Murphy and Karen Gilbertson, who were accompanying appellee, positively testified, and without contradiction, that they did not know the effects of the fumes that were being emitted into the passenger compartment of the bus (R. 77, 118). The court had the right to consider the conduct of all of the other passengers in the bus who smelled the fumes, had headaches and became nauseated and the fact that they likewise did nothing until after the appellee had been let out of the bus in the vicinity of Cashup and fainted. Their conduct, which speaks louder than words, discloses that they did not consider the fumes would do them any damage. It appears to appellee that this is about as fine a test as one could possibly have for determining what the reasonable, normal human being would do under like or similar circumstances; they were there, and subject to the same situation that confronted appellee. It was not until after appellee had become ill and went forward and notified the bus driver who thereupon stopped the bus, that anyone appears to have started to become concerned. Appellee as well as the other passengers in the bus are held to only that degree of care which is exercised by an ordinarily prudent person generally, and not that of an expert. *Morrison v. Lee*, 16 N.D. 377, 113 NW

1025, 13 L.R.A. (N.S.) 650. What other people did or failed to do under the same circumstances and the same time as appellee is a matter properly considered. In *Twomley v. Central Park etc. Railroad Co.*, 69 N.Y. 158, 25 Am. Reports 162, a number of passengers jumped from the defendant's car when it appeared that there was an impending peril which later proved not to be the case. The court there said,

> "Evidence of the action of other passengers was competent as part of the res gestae, and also as evidence of what was deemed prudent by those in the same situation * * *."

The court also had the right to take into consideration the fact that carbon monoxide is an odorless, tasteless, colorless gas (R. 446), and this has even been judicially stated. *Laughlin v. N.Y. Power and Light Co.*, 23 N. Y. S. 2d 292, 294. It cannot be detected by the senses. The fumes which were smelled in the bus were the oxides from the exhaust of the diesel engine. Of course these fumes carried a lethal gas. Passengers boarding buses do not carry instruments which are necessary to detect and measure carbon monoxide gas. The record in this case discloses the technical instruments which are required.

The court had the right to take into consideration the undisputed testimony that carbon monoxide gas affects people differently (R. 763) and that young people are more susceptible to this poisoning (R. 771, 688), and that the gas itself affects the judgment or

intelligence of those subjected to it and gives them a sense of well-being (R. 569, 739) and people affected by carbon monoxide poisoning will fail to take measures to protect themselves (R. 739, 569) because of the very nature of the poisoning. This testimony is undisputed in this record. In other words, considering the record in this case and the medical testimony, should the appellant be allowed, by reason of its negligence, to create a perilous situation in one of its passenger buses, traveling down the highway on a cold, dark November night, and then take advantage of someone, and particularly the appellee, and assert that appellee, who was the victim of their own negligence, should have acted differently? The very nature of appellant's negligence affected the appellee's judgment; can it now honestly complain about her conduct? It seems to appelle that it is like chloroforming someone and then complaining because they are asleep. Appellee sincerely believes, as did the trial court, that under the circumstances the undisputed evidence shows that appellee has met the standard of care required of her, and that reasonable minds cannot differ in arriving at the conclusion that she did.

In view of the record in this case there is no substantial evidence that would have justified the trial court in submitting the appellant's proposed instructions to the jury on the doctrine of contributory negligence.

Doctrine of Assumption of Risk Is Inapplicable

Appellant's fifth specification of error also complains of the trial court's failure to instruct on the doctrine of assumption of risk. Appellant's Proposed Instruction No. 17 (App. Br. 13) embraces the doctrine. Confusion among the cases exists because the term "assumption of the risk" is given different meanings. The Washington Supreme Court has held that the doctrine of assumption of risk applies in the master and servant relationship while its counterpart, namely the doctrine of volenti non fit injuria applies in other relationships. *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P. 2d 233. In accordance with Washington law, we will discuss appellant's alleged error as involving the legal doctrine of volenti non fit injuria. This doctrine is defined in *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P. 2d 233, as follows:

> "If one knowing and comprehending the danger voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery from an injury resulting therefrom. The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto."

In *Emerick v. Mayer*, 39 Wn. 2d 23, 234 P. 2d 1079, the court said:

> "In order to invoke the doctrine, it is essential that the plaintiff exposed himself or his property voluntarily. The doctrine can apply only where a person may reasonably elect whether or not he shall expose himself to a particular danger. Also,

it is essential that the risk of danger shall have been known to, and appreciated by, the plaintiff or that it shall have been so obvious that he must be presumed to have comprehended it."

Professor Prosser on Torts, 1955 Ed., p. 309, says:

"Ordinarily the plaintiff will not be taken to assume any risk of conditions or activities of which he is ignorant. Furthermore, he must not only know of the facts which create the danger, but he must comprehend and appreciate the danger itself. 'A defect and the danger arising from it are not necessarily to be identified, and a person may know of one without appreciating the other.' If because of age, or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it."

Professor Prosser further states (Prosser on Torts, 1955 Ed., p. 312):

"The risk is not assumed where the conduct of the defendant has left the plaintiff no reasonable alternative. * * * By placing him in the dilemma, the defendant has deprived him of his freedom of choice, and so cannot be heard to say that he has voluntarily assumed the risk."

From the foregoing it would appear that the doctrine can only be applied (1) if the plaintiff has freely and voluntarily consented to expose himself to the defendant's negligence, voluntarily meaning that the defendant's conduct has left the plaintiff a reasonable election or alternative, and (2), was the risk of danger known to and appreciated by the plaintiff? *Kingwell v. Hart*, 45 Wn. 2d 401, 275 P. 2d 431.

Applying the foregoing principles to the record in the case at bar, there is no evidence in this record, or even a reasonable inference therefrom, that appellee voluntarily consented to expose herself to carbon monoxide poisoning. When she became a paying passenger on appellant's common carrier bus at Spokane, Washington, she had a right to assume that appellant had performed its duty and that the bus was reasonably fit and safe for passengers. The situation as it subsequently developed as the bus traveled down the highway did not give her a reasonable election or an alternative. She was deprived of her freedom of choice as well as the other passengers in the bus who by their conduct also demonstrated that none of them consented to be made ill and nauseated from the fumes in appellant's bus. Secondly, there is no evidence in this record that appellee knew of and appreciated the danger of the risk involved. Again the conduct of the other passengers in the bus undergoing the same exposure to fumes would seem to clearly indicate that they did not know of and appreciate the danger of risk involved.

A passenger on a common carrier does not assume the risks of the carrier's negligence but has a right to assume that the carrier's employees will not be negligent and that all necessary precautions will be taken for their safety. *Central R. Co. of N. J. v. Hirsch*, 223 F. 44 (CCA 3); *Toroian v. Parkview Amusement Co.*, 331 Mo. 700, 56 SW 2d 134, 13 CJS, Carriers, p. 1545;

and annotations contained in Vol. 10, CJ, p. 1098, Note 44.

The burden of proving this defense of assumption of risk or volenti non fit injuria is upon the defendant. *Kingwell v. Hart*, 45 Wn. 2d 401, 275 P. 2d 431. Where the evidence does not warrant the giving of an instruction to the jury covering this doctrine, it is prejudicial to give to the jury such an instruction. *Anderson v. Rohde*, 46 Wn. 2d 89, 278 P. 2d 380.

It is submitted that when this whole record is considered it will disclose an absence of substantial evidence which would have warranted the trial court in giving the instruction requested by the appellant. Accordingly, we submit the trial court did not err in refusing appellant's Instruction 17.

IV

THE DAMAGES AWARDED BY THE JURY ARE NOT EXCESSIVE

Appellant argues that the jury by its verdict awarded excessive damages (App. Br. 44). In accordance with the decision of this court in *Southern Pacific Co. v. Guthrie*, 186 F. 2d, 926 (C.C.A. 9) it is incumbent upon appellant to demonstrate the verdict was monstrous or grossly excessive and that the trial court abused his discretion in refusing to grant the appellant's motion for a new trial based upon the claimed excessive verdict.

At the outset we desire to call the court's attention to some of the statements made by the appellant (App. Br. 44-59). There is no evidence in the record that this is one of the largest verdicts ever returned in this area. Even if it were, what difference does it make so long as the verdict is sustained by substantial evidence. Appellant misstates the record when it tells this court that "Both Dr. Southcombe and Dr. Hood admitted that they had seen or observed none," referring to appellee's attacks or seizures. Dr. Southcombe testified she had three petit mal attacks in his presence and that she was becoming more emotional and unpredictable (R. 690). Dr. Hood had appellee observed at the hospital. This disclosed that she had trouble walking, trouble eating, and with putting utensils and a cup to her mouth (R. 615, 616). Dr. Hood observed that the appellee had

trouble in her speech and blocking of her thought (R. 635). He determined that there was unsteadiness and lack of balance (R. 636). Even appellant's counsel witnessed one of appellee's fainting spells or seizures which occurred when her pretrial deposition was taken (R. 411, 419).

Appellant quotes from the testimony of its expert, Dr. Hale Haven, (App. Br. 27). Appellant failed to disclose to this court that Dr. Haven found the EEG disclosed dysrythmia (R. 1035). Appellant failed to tell this court that Dr. Haven would neither confirm nor deny a diagnosis of epilepsy (R. 1009, 1010, 1034); that Dr. Haven thought there was possibly something wrong with the appellee (R. 1027), and that "There might be a few cells knocked out," (R. 1030).

Appellant quotes Emma Lou Hoover (App. Br. 45-51) but omits that this witness testified that appellee was brought home from work because of headaches (R. 1063) and that appellee was brought home from work on a number of occasions which she could not remember (R. 1062) and that Emma Lou Hoover knew that appellee was taking medicine contained in a little bottle of white pills located in the medicine cabinet (R. 1072). Walta Lee Hoover knew that appellee was taking pills (R. 1079) and knew that appellee was having headaches (R. 1080, 1081) and further knew that her folks did not want her to drive a car (R. 1084).

Appellant refers to the testimony of Jo Ann Hodges (App. Br. 52) and Noreen Anderson (App. Br. 53). The testimony quoted is taken out of context. An examination of all of the testimony of both of the witnesses will disclose that the appellee was having very definite trouble as the result of the carbon monoxide poisoning and that it was becoming progressively worse. Furthermore as we have pointed out, the initial damage or injury to appellee is permanent, but it takes a considerable time for the residuals to manifest themselves (R. 739, 741).

Appellant sets forth a letter admittedly written by Jeanie Blakley with the advice and consent of her counsel (App. Br. 56). We have pointed out, the appellee did not voluntarily resign from her position at General Electric Company. The termination papers were made out while she was on her vacation and she had nothing to do with it. She was on restricted work duty; she could not be left alone, she could not walk up stairs. Obviously General Electric did not want an employee that they had to chaperon while on work duty.

Appellant complains because appellee did not call her boss as a witness. If appellant thought that appellee's boss would help in disproving the appellee's disability, the appellant would have been the first to bring him into court. It is evident from the record in this case that the appellant has spared no amount of money in bringing witnesses from all over the country.

Appellant quotes Mr. Buel (App. Br. 57, 58). Appellant lifts his testimony out of the record but fails to disclose all of Mr. Buel's testimony, which paints an entirely different picture than appellant would have this court believe. For example, Mr. Buel testified that when appellee was first employed she was a good worker, did a good job; later she tended to become more absent from the job (R. 261); that he had to take her home when she was ill, and that she apparently fainted while he was unlocking his car (R. 262); one time she fainted and fell to the floor and he assisted her (R. 263). Appellee was taken home from work on other occasions because she wasn't feeling good (R. 267). Mr. Buel also noticed her memory work and that it was not good. He attributed this to business, but on the other hand Mr. Buel did not know the medical diagnosis of appellee's condition (R. 266). A co-worker, Gayle Ryals, noticed appellee spilling coke upon her person, and it happened more than ordinary (R. 269). She observed appellee sleeping during the noon hour (R. 270), that appellee was having terrific headaches (R. 271). The testimony of Gayle Ryals, when considered in its full light, will disclose why appellee was terminated from General Electric. Mr. Rose, the boss of appellee, had a conversation with Miss Ryals concerning the appellee's health, and after this conversation appellee was terminated (R. 274).

The jury's verdict of $78,097.50 is not grossly excessive or monstrous, but is conservative.

The pretrial order claimed a total of $490.55 for medical expenses prior to the time of trial. The evidence disclosed the medical expense was actually in excess of $900.00 (R. 904). The trial court and counsel for appellee discussed the matter and it was agreed that although the evidence showed a greater amount of damages up to the time of trial, that appellee would be bound by this pretrial order rather than seek an amendment which might result in the appellant claiming surprise (R. 905). The court did allow an amendment claiming seventy-five cents a day for medicines required by appellee (R. 906). Dr. Southcombe, one of appellee's attending physicians, disclosed that the medicines appellee would be required to take for the remainder of her life cost seventy-five cents per day (R. 693). This testimony is uncontradicted. This would amount to $22.50 per month. The medical testimony is undisputed that by reason of the fact appellee was taking a highly dangerous medicine she would be required to be under the constant observation of a physician once a month who would have to take blood tests and make a physical examination to regulate the amount of her medicine. The fair and reasonable cost of this charge for medical attendance was the sum of $25.00 per month (R. 693). Adding the cost of medicines and the cost of medical attention results in a

total cost of $47.50 per month for the remainder of appellee's life. Appellee's life expectancy was 47.43 years (R. 1450). Translating the life expectancy of appellee into months gives a figure of 529.16 months. Multiplying this times the figure of $47.50 per month gives a total of $25,135.10.

Appellee at the time of her discharge or termination from General Electric was earning the sum of $73.30 per week (R. 868). Taking her life expectancy of 47.43 years and multiplying this by 52 gives a total of 2,465.36 weeks. This will establish a loss of future earnings in the sum of $188,106.96. Now that figure has not been reduced to its present value. However, appellant took no exceptions to the instructions on damages and no evidence was introduced on the matter of the present value of the loss of future earnings. The appellant is in no position to complain in that regard. However, cut the figure in half, and cut the medical expenses that this appellee will have to incur in the future in half, and you still have a justification for a verdict in excess of $100,000.00 The fallacy in reducing appellee's damages to present value in the case at bar is the fact that this girl is only beginning her working life. If one considers her background and what she was before this accident, it is quite obvious that this girl had a real future. It is just as reasonable to suppose in later years that she would have been earning more than she was earning at General Electric. This too

should be taken into consideration. Very few people set the standard of their future earnings by that which they earn when they are approximately twenty years of age. The earning prime of man does not generally arrive until he is approximately forty to fifty years of age.

What we have discussed heretofore is somewhat in the nature of special damages and does not even take into consideration the compensation to which appellee is entitled because of her disability; that is, to be a normal human being. She has lost her sense of balance and is unsteady on her feet (R. 636, 410). Her muscular coordination is materially affected (R. 269). She has petit mal seizures which occur at all hours of the day or night, and during these momentary lapses she blacks out wherever she may be, whether walking, driving, or attempting to work (R. 410, 411, 291). She has a loss of memory (R. 289, 414). She had and adverse personality change (R. 145, 569, 691). She has halting speech (R. 415). She has constant headaches (R. 185, 271). The spectacles of these attacks which appellee suffers are vividly presented in the record (R. 411, 271-2, 262, 191, 539-540). These cause her humiliation and embarrassment. Prior to her injury she was athletic and a good swimmer. Obviously she is no longer in a position to do the things that she used to do. These things were all brought before the jury, who rendered their verdict. Exclusive of the medical expense as well

as her loss of earnings, it is submitted that in view of the fact that this young lady is between 75 and 90% disabled, and in view of the fact that the undisputed medical testimony discloses that she will eventually develop what is known as a Parkinson's disease or palsy, a verdict of $50,000.00 for this condition alone would, we believe, be entirely reasonable. We submit that the verdict is in no wise excessive or monstrous, and that the trial court did not err in denying appellant's motion for a new trial.

V

NEGLIGENCE OF THE DRIVER

Appellant's specification of error No. 6 (App. Br. 13) asserts that the court erred in submitting to the jury the question of the bus driver's negligence.

The itinerary of the bus was Spokane through Spangle with a short normal passenger stop at Rosalia which is thirty-three miles from Spokane, through Thornton, and a stop on the highway at Cashup or in the vicinity of Cashup, (R. 1093, 1107, 1108) (Ex. 52) where appellee was taken out of the bus for fresh air and fainted. The testimony of Pattie Murphy, who was originally seated in the back of the bus, positively states that she went forward in the bus and complained to the bus driver of being sick and that the fumes in the bus were bad before the bus had reached Rosalia, (R. 118, 119, 131, 141) and the driver gave her something to sit on in the aisle of the bus (R. 119, 141). She told the driver that she could not get the window open (R. 141). The driver admitted remembering a girl coming to the front of the bus and giving her his air cushion (R. 1110). He claimed that this was after they had reached Rosalia (R. 1111). This is contrary to the testimony of not only Pattie Murphy but also of Karen Gilbertson (R. 77, 78). Further, it was mentioned to the bus driver at Rosalia that the fumes were bad (R. 79). The bus driver admitted he did not go back in the bus compartment at Rosalia (R. 1119).

Examination of the testimony in this record will disclose that the fumes in the bus were noticed by the passengers around Spangle and in the vicinity of Rosalia. Apparently everyone but the bus driver was aware of the fumes. It seems strange that he had no knowledge of any fumes in that coach (R. 1110). Compare testimony of Mary Fulseth, one of appellant's witnesses, who sat in front of bus just three seats behind driver, who smelled fumes and who was bothered with them and put her head scarf to her face (R. 1195), and further, there was talk on the bus about fumes (R. 1198). The driver was aware of the fact that fumes in the passenger compartment constitute a danger (R. 1119). He said that if the fumes were serious enough that he would not take the bus an inch (R. 1125). He also said that if you have any complaints, you don't use the bus (R. 1126). He is familiar with carbon monoxide, which is very dangerous in the passenger compartment (R. 1135).

Mr. West, who is a safety engineer for General Electric on the Hanford Project, (R. 438) has under his charge approximately 200 buses, plus 2,000 sedans and pickups (R. 438). The buses under his jurisdiction are diesel powered, (R. 439) and he is familiar with the safety precautions which are necessary in the operation of these buses. He is also familiar with carbon monoxide, which is an odorless, colorless and tasteless gas (R. 446). If there is a leak of carbon monoxide or an ex-

haust leak, the bus is taken from the trip (R. 482). If there were any exhaust fumes in the bus, the passengers would be immediately evacuated (R. 485) and the bus would be stopped immediately (R. 485).

From the foregoing testimony it is clear that an issue of fact was made for the jury as to whether the bus driver should have stopped at Rosalia and taken the bus out of service because of the complaints made by Pattie Murphy, and which the bus driver would have known had he investigated. Certainly, the bus driver, who was familiar with carbon monoxide poisoning and its dangerous qualities, could not continue to operate the bus in question without subjecting the passengers to harmful effects, for, in doing so, he was violating the high degree of care required of common carriers. In *Washington v. Spokane Street Railway Company*, 13 Wash. 9; 42 Pac. 628, the court held that it was the duty of a common carrier whose car was out of repair to give the passengers full notice of the condition and to give them the opportunity to decide whether or not they would continue as passengers. In the case at bar, the bus driver did not do this.

Contrary to appellant's assertions (App. Br. 59, 60) a standard of care was established by its own bus driver as well as plaintiff's expert, Mr. West. The jury could reasonably believe this standard was violated in view of the evidence.

We submit there was sufficient evidence to warrant the trial court's instruction on this issue.

CONCLUSION

It is submitted that after this whole record is considered that the action of the trial court, challenged by the appellant in its specification of errors, was not erroneous and that the judgment of the trial court should in all respects be affirmed.

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